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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5097

HAROLD EUGENE HUFFMAN,
Petitioner,

v.

FAYE I. BOERSEN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEBRASKA

BRIEF FOR THE PETITIONER

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OPINION BELOW

The Nebraska Supreme Court dismissed petitioner's appeal from the District Court of Hall County, Nebraska without rendering an opinion. The journal entry appears in the records of the Nebraska Supreme Court in the journal designated ZZZ, at page 343 (A. 75).

JURISDICTION

The Nebraska Supreme Court's order dismissing Huffman's appeal was entered on June 14, 1971. Huffman, pro se, filed his petition for writ of certiorari on July 16, 1971 with appendices which included (i) motion to proceed in forma pauperis, (ii) affidavit of forma pauperis, (iii) certificate of service, and (iv) substantial portions of the record below.

On December 14, 1971, the petition for writ of certiorari to the Supreme Court of the State of Nebraska, leave to proceed in forma pauperis and for appointment of counsel was granted. Appointment of counsel for petitioner was entered on December 20, 1971.

The jurisdiction of this Court rests on 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Where Petitioner was admittedly indigent, did the State of Nebraska violate Petitioner's constitutional rights under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, by dismissing his appeal to the Nebraska Supreme Court for failing to file a $75.00 cost security (bond or cash) in an action for marraige annulment and determination of paternity?

2. Are the cost security, brief, printing and filing fee requirements of the State of Nebraska violative of an indigent's Fourteenth Amendment due process and equal protection rights which deny his right to appeal to the Nebraska Supreme Court in a marriage annulment and determination of paternity action?

3. Did the trial court deny Petitioner due process of law when, after being informed of his incarceration in the state penitentiary and inability to afford counsel, due to his indigency, it proceeded to try the annulment and paternity action in his absence?

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

1. UNITED STATES CONSTITUTION

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. STATUTES

The Nebraska Statutes, the constitutionality of which are challenged in this action are:

(a) Section 25-1912, Vol. 2, R.S. Neb. 1943 (R.I. 1964), providing in pertinent part that:

> "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, . . . shall be by filing in the office of the clerk of the district court . . . within one month after the rendition of such judgment or decree, or the making of such final order, . . . a notice of intention to prosecute such appeal signed by the appellant . . . or his . . . attorney of record, and, . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. . . . an appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed, and such docket fee deposited in the office of the clerk of the district court, . . . and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. . . ."

(b) Section 25-1914, Vol. 2, R.S. Neb. 1943 (R.I. 1964), providing in pertinent part that:

> "On appeal in any case taken from the district court to the Supreme Court the appellant . . . shall, within one month next after the rendition of the judgment or decree . . . sought to be reversed, vacated or modified, . . . file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose; *Provided,* that if a supersedeas bond is executed no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the Supreme Court. The appeal may be dismissed on motion and notice in the Supreme Court if no bond has been given and certified in the transcript, or within such additional time as may be fixed by the Supreme Court for good cause shown."

(c) Section 25-1919, Vol. 2, RS Neb. 1943 (RI 1964) providing in pertinent part that:

> "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. . . ."

(d) Section 33-103, Vol. 3, R.S. Neb. 1943 (R.I. 1968), providing in pertinent part that:

> "At the time of filing an appeal, or original suit, or proceeding in the Supreme Court there shall be paid to the clerk the sum of twenty dollars as a docket fee, and the appellee or adverse party shall pay a docket fee of five dollars upon entering his appearance, or filing a motion, pleading or brief in the case. These payments shall cover all clerk's fees except that the clerk shall be paid for each copy ordered of any pleading, record or other paper or

any part thereof, for each ten words, one cent; for certificate and seal, fifty cents."

3. RULES OF THE NEBRASKA SUPREME COURT

(a) Rule 1a, which is in the language of Section 25-1912 (a) supra.

(b) Rule 3b, providing that:

"Security for Costs. An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R.R.S. 1943, unless additional time for compliance be granted for good cause shown."

(c) Rule 9a providing in pertinent part that "all briefs shall be printed unless otherwise allowed by the court on good cause shown."

(d) Rule 9d providing that:

"Cost of Printing. When the parties or their attorneys furnish their printed briefs in conformity to the rules of this court it shall be the duty of the clerk to tax a fee therefor against the unsuccessful party to be collected and paid to the successful party as other costs. Costs shall not be taxed for the printing of a reply brief except such part as is in answer to a cross-appeal, nor for printing briefs unless printed, served, and filed in conformity with the rules of this court. The amount taxed shall not be in excess of $2.60 per page but in no event to exceed the actual cost of printing. Proof of the actual cost of printing shall be submitted to the clerk with the filing of the brief. The total number of pages that may be taxed as costs shall in no event exceed 75."

(e) Rule 10, providing that:

"Failure to Comply. The clerk shall refuse to file any brief not prepared in accordance with these rules and shall immediately notify counsel of the objections thereto."

(f) Nebraska has no statute providing for waiver of filing fees, security for costs, printing of briefs, or providing for

appointment of counsel in annulment of marriage actions in the trial court or on appeal. On January 4, 1972, L.B. 1120 was introduced in the Nebraska Legislature to provide for proceedings in forma pauperis. Inter alia it provides for the waiver of filing fees and security for costs by indigents and that the cost of printing of briefs shall be paid by the counties. The bill is not retroactive and no present information exists as to whether or not it will be passed in its present form or in amended form.

STATEMENT OF THE CASE

On March 5, 1969 respondent, using her maiden name of Faye I. Lavender, married petitioner at Las Vegas, Clark County, Nevada (A. 1)

On November 5, 1970 respondent filed a petition for annulment of said marriage in the District Court of Hall County, Nebraska (Docket 58, page 140, Case No. 17416), alleging that on the date of said marriage she was legally married to Richard A. Boersen. She further alleged that on April 24, 1969 a divorce decree was entered in the District Court of Hamilton County, Nebraska, dissolving her marriage to Boersen, which did not become final until October 29, 1969 (A. 1).

On November 9, 1970 summons was served upon Huffman at the State Penal Complex in Lincoln, Nebraska (A. 2, 3.) He was serving a sentence for forgery and uttering forged instruments (*State of Nebraska v. Harold Huffman,* April 10, 1970, 185 Neb. 417, 176 N.W.2d 506, and post-conviction opinion May 7, 1971, 186 Neb. 809, 186 N.W.2d 715).

Huffman prepared and filed all pleadings pro se.

On November 12, 1970 Huffman filed:

(a) separate pleadings entitled Motion to Dismiss (A. 4.5), Motion to Quash (A. 6) and Demurrer (A. 7) alleging:

(1) Lack of jurisdiction in the court because of prior criminal trials, in which the same judge refused to rule on the validity of this marriage, and

(2) Because of the doctrine of unclean hands, respondent was barred from seeking an annulment;

(b) other pleadings entitled Motion to Supress (A. 8, 9) and Objection (A. 10) denying Faye Boersen's right to adduce evidence because of her prior acts, which invoked the doctrine of unclean hands and fraud.

(c) a Reply (A. 11, 12, 13) alleging he was incarcerated in the State Penitentiary, that a child born to Faye Boersen on October 31, 1969 was Huffman's son and not the son of Richard A. Boersen and in different form the allegations similar to the other pleadings.

On November 17, 1970 Huffman filed:

(a) a Motion for Appearance (A. 14) alleging that he was incarcerated in the State Penitentiary, that the trial judge had authority to order the warden to produce Huffman in person at the hearing, that he had no legal counsel, was representing himself pro se, and asked for the right to be present to cross-examine Faye's witnesses and to call witnesses on his own behalf.

(b) a Motion to strike the name of Faye I. Boersen and replace it with Faye I. Huffman (A. 15) on the ground that the marriage to Huffman was not void.

(c) two Motions (A. 16, 18) asking that the affidavits of himself and Merle Burside be admitted into evidence (A. 17, 19, 20, 21, 22).

On November 24, 1970 Huffman filed an "Objection" (A. 23) objecting to any proceeding where Faye would present evidence and which would deny his right to examine, inspect and object to any of her evidence; and which would deny his right of cross-examination. He stated that he was appearing pro se, had no legal counsel, was unable to obtain counsel because "of his pauperis nature" and to deny him the above rights would be illegal, unlawful and contrary to the Constitution of the United States.

On November 25, 1970 Huffman filed his "Defendant's Resistance and Counter-Suit" (A. 24-44 incl.) of 22 pages which was a combination of a responsive pleading, a recitation of much evidence, references to cases pending in the Federal District Court, and argument.

On March 16, 1971 respondent's attorney ex parte requested the court to set the case for trial (A. 45) which the court granted. The court found that all of Huffman's motions, objections, briefs, affidavits, etc., filed prior to the "Resistance and Counter-Suit" were irrelevant and without merit and were overruled, and set the case for trial on March 26, 1971 at 1:30 p.m. (A. 45). On March 19, 1971 this was solemnized by a journal entry (A. 46).

On March 22, 1971, Huffman was served with a copy of said journal entry and wrote the judge a letter demanding to be present, having no counsel, due to his pauperis nature (A. 48).

On March 26, 1971 trial was held before the Honorable Donald H. Waver, District Judge, in Grand Island. (A. 49, 58, 59, 60). Huffman was not present, nor was any attorney present representing him. Faye's attorney was present. Faye was the only witness called. She testified that she was first married to Richard Boersen on June 12, 1964 in Grand Island, that Boersen secured a divorce in Hamilton County, Nebraska on April 24, 1969. (She had filed the divorce action in February, 1969 and Boersen had counterclaimed.) A certified copy of that decree of divorce appears at (A. 63 offered at 59) was admitted into the record. She testified she was married to Huffman on March 5, 1969 in Las Vegas, Nevada and at the time was

married to Richard A. Boersen, and asked that the Huffman marriage be declared void. (A. 60.) The court granted the annulment and found the resistance and counter-suit without merit and dismissed it, and the order of annulment was entered (A. 49, 50, 60).

On April 9, 1971 Huffman filed with the clerk of the trial court a notice of appeal, a praecipe for a bill of exceptions, a praecipe for transcript and a motion to have the court enter an order directing the clerk to prepare the transcript and bill of exceptions, wherein he stated that he forwarded a $20.00 docket fee and the bond as required by law (A. 51, 52, 53, 54).

On May 4, 1971 the clerk certified to the Supreme Court of Nebraska a copy of the transcript and bill of exceptions, and that no cash bond was deposited but only the $20.00 docket fee was received (A. 55).

On May 19, 1971 in the Nebraska Supreme Court Faye's attorney filed a motion to dismiss Huffman's appeal (A. 67) for the reason that no bond, undertaking or cash deposit had been given as required by Section 25-1914, R.R.S. Neb. 1943. On the same date he filed a notice of hearing addressed to Huffman (A. 68), stating that the motion to dismiss would be heard by the Nebraska Supreme Court on June 1, 1971 at 9:00 A.M. Proof of service of the notice was also filed stating that a copy of the motion to dismiss and the notice of hearing was mailed to Huffman at the penitentiary (A. 69).

On May 25, 1971 Huffman filed his "Objection," objecting to the motion to dismiss the appeal alleging that he had paid the $20.00 docket fee, that he had submitted his brief to the Gant Publishing Co. for printing the brief, that he was indigent and he submitted his affidavit of poverty. He pleaded that to grant the motion would deny him access to the courts because "of his pauperis nature," would unconstitutionally deny him his rights to defend himself, that Nebraska statute 25-1914 was unconstitutional as it was being applied to him, citing *Boddie v. Connecticut*, 401

U.S. 371 (1971), and asked that the requirement of the bond be waived (A. 70, 71).

At the same time he filed a "Motion to Proceed in Forma Pauperis" and his affidavit. He cited *Boddie v. Connecticut*, 401 U.S. 371 (1971). (A. 72, 73).

The affidavit states that he has no bonds, security or property, that he is incarcerated in the Nebraska Penal Complex, that his only income is 30¢ per day prison wages, from which he paid the $20.00 docket fee, that he is paying for the printing of his brief which was then at Gant Publishing, that he has no money and that no one is holding any money for him (A. 73).

He also filed a second "Motion" stating that if the appeal is dismissed, that in view of *Boddie v. Connecticut* the mandate be stayed to allow him to file a petition for writ of certiorari to the United State Supreme Court (A. 74).

On June 14, 1971 the Nebraska Supreme Court dismissed the appeal on the motion of Faye, taxing the costs to Huffman (A. 75) and entered an order staying the mandate until September 14, 1971 (A. 76).

On July 16, 1971 Huffman filed in the Supreme Court of the United States his petition for writ of certiorari with appendix. Included was a motion to proceed in forma pauperis, affidavit and motion for appointment of counsel.

On July 28, 1971 Huffman filed a motion for an indefinite stay of the mandate until the Supreme Court of the United States ruled on his Petition for Writ of Certiorari filed on July 16, 1971 (A. 77). This was granted by the Nebraska Supreme Court (A. 78).

Huffman had prepared a typewritten brief pro se, which was delivered to Gant Publishing Co. in Lincoln, Nebraska. The cost was $88.58 and was paid on June 14, 1971 from his account in the inmates fund at the penal complex. On June 16, 1971 Mr. Paul, the president of Gant Publishing Co., attempted to deliver the printed briefs to the Clerk of the Nebraska Supreme Court, which were refused, on the

grounds that the case had been dismissed. Mr. Paul then delivered the briefs to Huffman. Huffman's funds at the Nebraska Penal Complex, after deducting the $20.00 docket fee and the $88.58 printing cost, did not exceed the sum of $5.00. Huffman had no other funds or resources available to him, directly or indirectly. (Stipulation of Counsel–Appendix B to this Brief.)

SUMMARY OF ARGUMENT

1. The respondent, Faye I. Boersen, brought an action in the Hall County District Court of Nebraska situated in Grand Island, to annul her marriage to the petitioner, Harold Eugene Huffman. By his pleadings filed in the trial court, Huffman sought to uphold the validity of this marriage and to establish his paternity of the child born to Faye on October 31, 1969. The trial court granted the annulment and dismissed Huffman's "Resistance and Counter-Suit."

Throughout these proceedings Huffman has been incarcerated in the Nebraska Penal Complex at Lincoln, Nebraska. He was not allowed to be present at the trial or at the argument in the Nebraska Supreme Court. All documents on Huffman's behalf, until appointment of counsel by this Court, were prepared and filed pro se.

2. The statutes of Nebraska and the rules of its Supreme Court impose substantial monetary requirements for appeals. These monetary requirements are insurmountable to the indigent and effectively prevent him from securing access to the appellate court. In Nebraska the appellant needs in hand (i) $20.00 for a docket fee, (ii) $75.00 for security for costs, (iii) payment to a printer of the cost of printing the brief (15 copies in the Supreme Court, at least one copy for the attorney for the adverse party and at least one copy for himself). Other costs which may or may not be required in advance are the court reporter's statutory charge for preparation of the Bill of Exceptions and clerk's certification of the notice of appeal.

By statute and court rule, therefore, it is required that these fees be paid, security for costs be furnished, and the other charges be met in order to get the appeal lodged and to stay in the appellate court in order to be heard.

There is no statute or court rule waiving these financial requirements for the indigent. By the invidious discrimination of such financial requirements, the poor appellant in Nebraska is denied the right to secure review of his cause.

3. The Nebraska Constitution guarantees all of its citizens in all civil cases the right to appeal to the court of last resort, the Nebraska Supreme Court. This right by that court's own pronouncements, is guaranteed without regard to the merit, or the lack thereof of the appellant's cause. It is irrelevant that there be any creditable bases that errors were committed in the court below.

Huffman filed the jurisdictionally-required notice of appeal and paid the $20.00 docket fee. He made arrangements to secure a printed brief and paid the printer $88.58. At this point he had less than $5.00 remaining to him with no other funds to provide the $75.00 security for costs. Faye filed her motion to dismiss the appeal for this omission pursuant to Section 25-1914 R.R.S. Neb. 1943. The Nebraska Supreme Court dismissed the appeal in the face of Huffman's Objection, Motion to Proceed in Forma Pauperis and Forma Pauperis Affidavit.

The application of this Nebraska statute to Huffman worked an invidious discrimination against him, which is constitutionally impermissible.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held it a denial of due process to prevent an indigent plaintiff access to the state court in a divorce action because of her inability to pay the initial filing fee and service of process fee.

Because of *Boddie*, it then follows that the rationale of *Griffin v. Illinois*, 351 U.S. 12 (1956), applies to the appeal of causes involving matrimonial and family relationships.

The Equal Protection Clause prevents a state from denying an indigent's right to appellate review.

If appeal from a conviction for violation of a traffic ordinance (*Williams v. Oklahoma City*, 395 U.S. 458 (1969)), and if appeal from a sentence or a fine on a conviction of a misdemeanor (*Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971)), cannot be denied the indigent because of the Equal Protection Clause, then under *Griffin* appeal cannot be denied in an action involving matrimonial and parental rights. In such cases appellate review is an integral part of the adjudicatory process.

Cost recoupment and resource allocation by the state are antithetical to the Equal Protection Clause. Vital state services such as resort to the courts are not to be made available on the basis of ability to pay. (Compare *Harper v. Virginia*, 383 U.S. 663 (1966), denying a $1.50 poll tax as a prerequisite to voting; and *Shapiro v. Thompson*, 394 U.S. 618 (1969), denying application of length of residence and tax-paying ability to eligibility to receive welfare benefits.)

It is irrelevant to the issue involved that the security for costs in Huffman's case was for the protection of the adverse party. It is a state-imposed condition and is as effective in denying justice because of poverty as the filing fee paid to the state.

4. Huffman was denied due process of law when the trial court refused, upon his repeated requests, to order him brought to the place of trial. The state permitted him to be served with summons at the state penitentiary and then refused to permit him to be present at the trial. The giving of notice of suit by the state was a nullity if the state physically prevented him from being present at the hearing. Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard. This encompasses the right to be present to confront adverse witnesses and present evidence and argue orally.

ARGUMENT

I. THE COSTS OF APPEAL TO THE NEBRASKA SUPREME COURT IN A CIVIL CASE ARE SUBSTANTIAL AND ARE AN INSURMOUNTABLE BARRIER TO THE INDIGENT.

There are two jurisdictional steps that must be followed to perfect an appeal from the District (trial) Court to the Nebraska Supreme Court, and these must be performed within the times prescribed. The pronouncement by the trial court is the rendition of the judgment, decree or final order and it determines the dates required for filing rather than the date when the written orders are signed or entered of record.

There are other requirements that are not clothed with the sanctity of jurisdictional requirements but they can cause the same result—loss of the right to appeal.

All of the steps in the process have a financial require- to a greater or lesser degree.

1. A notice of appeal must be filed and a docket fee of $20.00 must be paid within one month after the rendition sought to be reversed. The notice of appeal is filed in and the docket fee paid to the clerk of the district court (Sec. 25-1912, R.R.S. Neb. 1943).

2. (a) If there is a money judgment, a supersedeas bond must be filed to prevent execution of the judgment. The amount of the supersedeas bond is set by the district court and must be filed within twenty days of the rendition (Sec. 25-1916, R.R.S. Neb, 1943). If filed, it also acts as a cost bond (Sec. 25-1914, R.R.S. Neb. 1943).

(b) If there is no money judgment or the party appealing does not desire to supersede the judgment, a cost bond or cash deposit in the amount of $75.00 must be filed in the district court within one month after the rendition. If not filed, the appeal is subject to dismissal on motion of the appellee (Sec. 25-1914, R.R.S. Neb. 1943, and Supreme Court Rule 3b).

3. (a) Praecipe for transcript and request for bill of exceptions should also be filed at the same time as the notice of appeal and the payment of the docket fee within the one-month period of time.

(b) The clerk of the district court delivers a copy of the praecipe and endorsements to the court reporter and sends a copy to the clerk of the Supreme Court (Supreme Court Rule 7c).

(c) The court reporter delivers the bill of exceptions to the clerk of the district court within two months from the filing of the praecipe. He is entitled to be paid and the appellant is taxed the cost thereof at the rate of 45¢ per 100 words (Sec. 24-342, R.R.S. Neb. 1943).

(d) Upon receipt of the bill of exceptions from the court reporter, the clerk of the district court files it and notifies all parties and the clerk of the Supreme Court of the date of filing (Supreme Court Rule 7d).

4. If an extra copy of the notice of appeal is filed with the original in the District Court, the District Court Clerk certifies it to the Supreme Court and it reduces the cost of an additional copy by approximately 50¢. There is a charge for the certification which is in addition to the Docket Fee and normally is paid at the time the Notice of Appeal is filed.

5. The Transcript is filed in the Supreme Court within one month from filing Notice of Appeal (Sec. 25-1912, R.R.S. Neb. 1943).

6. Appellant must file his brief within one month from the expiration of the time allowed by court rules for preparing and filing the Bill of Exceptions, and shall file proof that service was made on or before brief day (Supreme Court Rule 11a(1)). The brief must be printed (Supreme Court Rule 9).

7. Within one month after the appellant has served and filed his brief, the appellee shall file his brief with proof of service (Supreme Court Rule 10a(2)).

8. Within ten days after the appellee has served and filed his brief, the appellant may serve and file a reply brief (Supreme Court Rule 11a(1)).

9. The costs of printing the brief are paid initially by the party submitting the brief. Costs are taxed to the unsuccessful party. The maximum that the successful party can recover as costs for his printing bill is $195.00 (75 pages at $2.60 per page) (Supreme Court Rule 9(d)).

The foregoing summary indicates the financial needs to appeal any civil case to the Nebraska Supreme Court. It shows that in addition to being able to prepare the various notices, praecipes and drafts of briefs there is a requirement of fees to the Clerk of the District Court for his certificates, the Court Reporter for the Bill of Exceptions, the $20.00 docket fee, the $75.00 security for costs, and the brief printing charge (Huffman's was $88.58).

II. THE STATE OF NEBRASKA HAS GUARANTEED TO ALL ITS CITIZENS A RIGHT TO BE HEARD IN ITS SUPREME COURT. HAVING GRANTED THE RIGHT TO BE HEARD, THE STATE CANNOT THEN WITHDRAW IT FROM THOSE CITIZENS UNABLE TO PAY THE COURT COSTS INVOLVED IN AN APPEAL. NEBRASKA DENIED HUFFMAN THE EQUAL PROTECTION OF THE LAW WHEN ITS SUPREME COURT DISMISSED HIS APPEAL BECAUSE OF HIS INABILITY TO POST A COST BOND.

Article I, Section 24 of the Nebraska Constitution provides that:

> "The right to be heard in all civil cases in the court of last resort, by appeal, error or otherwise, shall not be denied."

This constitutional right to appeal is reconfirmed in Section 25-1911, Vol. 2, R.S. Neb. 1943 (R.I. 1964), and is supported by a long line of Nebraska cases, e.g. *Ferber v. Leise*, 97 Neb. 795, 151 N.W. 307, 308 (1915).

However, while the right to appeal is guaranteed, the Nebraska court has held that this right is subject to the imposition of reasonable rules and regulations as the Legislature shall prescribe. *Weiner v. State*, 179 Neb. 297, 137 N.W.2d 852 (1965). One of the regulations prescribed by the Legislature, which the Nebraska court has upheld, is the requirement of a cost bond on appeal. *School District v. Traver*, 43 Neb. 524, 61 N.W. 720 (1895).

While the state's power to prescribe reasonable rules and regulations governing the course of appeal cannot be doubted, those rules and regulations cannot operate so as to work an invidious discrimination among citizens. *Griffin v. Illinois*, 351 U.S. 12, 18, 19 (1956). As this Court held in *Griffin*,

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [Citing cases.] But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . Consequently at all stages of proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations."

This rule was reaffirmed in *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969), and was extended to a defendant desiring to appeal from a conviction and jail sentence imposed for violation of a City ordinance, a proceeding treated by Oklahoma as a quasi-criminal. In *Williams v. Oklahoma City* this Court held that:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned dis-

tinctions that can only impede open and equal access to the courts.' [Citing cases.]

". . . . the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a 'case-made.' This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make."

Finally, in *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971), this Court extended the right to a free appeal to an indigent defendant who had been convicted of a misdemeanor and sentenced to pay a fine. The Court noted (page 379) that: "The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony case, than in a felony case." It then went on to hold that:

"Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant. Cf. Shapiro v. Thompson, 394 U.S. 618, 633 (1969)."

The logical progression, from *Griffin*, dealing with the defendant sentenced to the penitentiary to *Mayer*, dealing with the defendant who has been fined, mandates the further extension of the *Griffin* analysis to a party appealing in a civil case. However, before dealing with this broader issue, we note the special treatment accorded the parties to matrimonial litigation in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which mandates the extension to them of a free appeal under the *Griffin* analysis.

In *Boddie*, supra, this Court held that an indigent plaintiff could not be denied access to the state courts in a

divorce suit solely because of her inability to pay an initial filing fee and service of process fee. The majority opinion in *Boddie* is bottomed upon the due process clause of the Fourteenth Amendment and scrupulously avoids passing upon equal protection questions unnecessary to the decision. However, there are substantial equal protection overtones in the Court's opinion. In *Boddie*, the Court held that:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so" (at p. 382).

In *Boddie*, this Court held that the indigent had a right to free access to the means which the state had prescribed for dissolving the marital relationship. In matrimonial cases, as in criminal cases, appellate review has become an integral part of the system for finally adjudicating rights. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). If an indigent defendant has a right to free access to the means provided by the State for adjusting matrimonial relationships, he has a right to access of all those means. What this Court in *Griffin* (at 19) said of criminal cases is equally applicable to matrimonial cases:

> ". . . Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial

> is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

In *Boddie*, as in the criminal cases that had preceded it, this Court noted that ability to pay fees was not rationally related to the merits of a particular litigant's claim. What was said of the initial petition to dissolve a marriage in *Boddie* is equally applicable at the appellate level. Ability to pay fees or provide security for costs is no more related to the merits of a claim on appeal than it is at a trial.

In *Boddie*, this Court also rejected arguments based on cost recoupment and resource allocation as a justification for the imposition of cost requirements on indigent parties to matrimonial litigation. This reasoning is applicable at the appellate level. Arguments based on resource allocation or cost recoupment are bottomed on the concept of justice as a commodity which the state purveys. Such a concept is antithetical to the theory embodied in the Equal Protection Clause. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Carried to the logical conclusion, arguments based on resource allocation or cost recoupment (market concepts) would allow the state like any other rational purveyor of a commodity to so set its fees as to maximize the profits from the judicial process. However, in our system justice is not a commodity, and the state may not price an indigent out of as effective an appeal as is available to those who can pay. *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971).

Since the Due Process Clause applies to the threshold right to file a divorce action dissolving the marriage relationship, then due process and equal protection apply to assure the indigent an appeal from an adverse decree dis-

solving the marriage relationship. *Boddie* mandates the first, and *Griffin* mandates the latter.

This line of reasoning is not limited solely to matrimonial cases. The situation of any defendant appealing from an adverse decision in a civil case is clearly parallel to that of a defendant appealing in a criminal case. A defendant in a civil case cannot be deprived of a legal right without a hearing, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). If the defendant cannot be deprived of his right to be heard at trial because of indigency, he should not be deprived of an appeal because of indigency. If a defendant loses a civil case, the obligation which will be enforced against him is as much an obligation imposed by the law of the State as is an obligation imposed by the criminal law. The authority of the State lies behind a civil judgment. The power of the state will enforce it. While the potential consequences of a criminal judgment are usually more severe, the loss of property of dissolution of marital and parental relationships through court judgment can have an impact upon a party equal to or even greater than the impact of a criminal judgment. The consequences of a civil judgment are too serious and potentially too severe to be distinguished in a meaningful way from the consequences of an adverse judgment in a criminal case.

Any distinction between defendants in civil and criminal cases becomes completely attenuated when the right of an indigent to a free appeal is extended to those convicted of misdemeanors who are merely fined. Such defendants are punished only in their pocketbooks, and the fines imposed seldom equal in dollar amount typical judgments in civil cases. Yet, this Court has extended the right of free appeal to the indigent convicted of a misdemeanor, because "the size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971).

This is a matrimonial case. As a result of the decision of the Hall County District Court, Huffman's marital relationship with his wife was held to be a nullity and his right to establish his paternal right was denied. Under the *Boddie* reasoning, and because of the close analogy between his situation as a defendant in a civil case and that of a defendant in a criminal case, he should have been extended a free appeal. However, we do not believe that analysis should stop there.

As we have already noted, limiting access to the courts upon the ability to pay fees, is essentially at war with the concept of a government of laws embodied in the Equal Protection Clause. State services as vital to the citizen as those provided by the courts should not be treated as commodities. The ethical and historical roots of our legal system are at one in condemning a rationing of justice in proportion to ability to pay.

In *Harper v. Virginia,* 383 U.S. 663, 666 (1966), this Court held that:

> ". . . a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. . . ."

In reaching that ultimate conclusion this Court noted that it had long recognized

> "The political franchise of voting [is] a fundamental political right because preservative of all rights." (at page 667.)

Because of the special character of the right to vote in the political process "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (at page 667). The Court then went on to state, at page 668:

> ". . . Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in

> the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause, ..."

The right of access to the courts bears the same relationship to other legal rights as the vote bears to other political rights.

> ". . . The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship, . . .*" *Chambers v. Baltimore and Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). [Emphasis supplied.]

Whatever the jurisprudential merits of the view of Justice Holmes that legal rights are valid only insofar as they are enforceable, the practical accuracy of that view cannot be questioned. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). If fee payment can be made a condition precedent to access to the courts, then, for those without money, legal rights become ghosts which they will never grasp.

If access to the courts is limited by ability to pay fees, then as a practical matter, legal rights are measured by wealth. Since the State has a practical monopoly on the instruments of force, a person must ultimately look to the State through its courts for the vindication of his rights. Even where settlement is arrived at without suit, it is because the authority of the State can ultimately be marshalled behind a claim. Without the access to the courts, a legal right does not exist.

A right a court will enforce or an obligation it will recognize is significantly different from a right or obligation recognized solely as a matter of business necessity, courtesy, or honor. A sheriff will not sell a person's house if he fails to keep a dinner date. However, if he fails to keep a promise which a court calls a contract, the sheriff may sell his home to satisfy an award of damages. One who tells blue stories in front of a lady is no gentleman. However, one who imputes unchastity to a lady, which a court calls slander, can lose his savings in satisfaction of a judgment.

Ability to pay the fees and costs involved in litigation is as irrelevant to the ultimate merits of a claim as the ability to pay a tax is to the capacity to exercise the franchise. "There [is] no necessary connection between a litigant's assets and the seriousness of his motives in bringing a suit. . . ." *Boddie v. Connecticut*, 401 U. S. 371, 381.

The right of access to the courts is vital. The ability to pay fees and costs is irrelevant to the validity of a claim. Access cannot be denied on the basis of ability to pay. Once the basic right to access is established, the right to appeal, if given to others, cannot be denied because of inability to pay fees for an appeal. *Griffin v. Illinois*, supra.

State trial and appellate courts provide vital public services. The State has a real interest in minimizing the costs of those services. However, a system which minimizes those costs at the expense of the indigent is constitutionally impermissible. The State may price these services, but it may not price them in such a way as to deny the indigent access to them. As this Court said in *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969).

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or

deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The fee which Huffman was unable to pay in this case was a cost security imposed by the State for the benefit of the other party to the litigation. However, we do not believe that this is a distinguishing factor. If the State's interest in protecting its own purse is insufficient to justify denying an appeal to an indigent, then its interest in saving a private party from unnecessary expense is not a sufficient justification for denying an appeal. If saving to the whole community does not justify barring the indigent, then saving to one individual cannot justify such a bar. When the interest of the whole community is not sufficient to bar an appeal by the indigent, the interest of one of its parts should not be.

To hold that the State may not constitutionally bar indigents from access to the courts for its own benefit, but may do so for the benefit of a private party would be to give a constitutional right with one hand and then take it back with the other. A person without funds is barred from the courts whether he has to pay a $75.00 filing fee or a $75.00 cost bond. In either case, justice can be denied because of poverty. Such a denial becomes no more

rational because the interest being protected is a private rather than a public interest.

If the State's reason for requiring cost security is to reduce frivolous or unjust appeals, it must not permit such a requirement to have the reverse effect of preventing meritorious and good faith appeals by the indigent. This would seem to be consistent with the Nebraska Supreme Court pronouncement as to Section 24, Article I, of the Nebraska Constitution as exemplified in *Ferber v. Leise*, 97 Neb. 795, 151 N.W. 307, 308 (1915):

> "It will be seen that this section says 'all civil cases.' It does not say all meritorious cases, but all civil cases. This means that none is to be excluded. If the power was forbidden to be exercised except in those cases where errors are alleged and proven, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all. In any event, the people, by the adoption of this provision of the Constitution, have said to the Supreme Court, You must not deny 'the right to be heard,' and this right applies to all civil cases."

The minimal bond required by the State of Nebraska offers only limited protection to the other party to an appeal, while it totally bars the very poor from the appellate courts. A bond of $75.00 would hardly reimburse an appellee for the ordinary costs of having a brief printed. The protection it offers an appellee is minimal. However, $75.00 for the very poor is a hurdle on the way to appellate review which they cannot leap. The State affords a minimal protection to all appellees at the price of totally barring a limited class of litigants, the very poor, from its appellate courts. If appellees need protection from the costs of frivolous appeals some fairer method must be found of affording that protection.

III. THE STATE OF NEBRASKA DENIED HUFFMAN DUE PROCESS OF LAW, WHEN THE STATE DISTRICT COURT AFTER BEING INFORMED THAT HUFFMAN WAS INCARCERATED IN THE STATE PENITENTIARY AND THAT HE WAS INDIGENT AND UNABLE TO AFFORD COUNSEL, PROCEEDED TO TRY THE ANNULMENT CASE IN HUFFMAN'S ABSENCE.

In *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), this Court noted that:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' [citing cases]. The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313."

Huffman was served with originating process (summons) while incarcerated in the Nebraska Penitentiary (A. 2&3). He had notice of the pendency of the annulment proceedings. Upon receipt of the summons, Huffman timely notified the Hall County District Court that he was incarcerated in the State Penitentiary and that, therefore, he could not be present for the trial of the annulment proceeding unless the

District Court ordered him produced for the trial (A. 14, 23 & 47). He also timely notified the court that he was unable to afford counsel (A. 14, 23, 47). The Hall County District Court refused to take any action on Huffman's request to be present for the trial of the annulment proceeding. Notice of the court's action setting the date for trial was served upon Huffman at the State Penitentiary four days prior to the hearing. That same day Huffman again demanded of the trial court the right to be present (A. 47), but the case was tried in his absence.

In an adjudicatory proceeding a party's right to be heard encompasses "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). The State of Nebraska denied Huffman this right of participation, when the trial court failed to order Huffman's presence in court at the time of the annulment proceeding.

Of what worth to Huffman was a technical opportunity to be heard? The trial was held in Grand Island. He was in Lincoln, 100 miles away, surrounded by iron bars, armed guards, and concrete walls intended to keep him there. While the State of Nebraska holds its courts open to suits against those incarcerated in its penitentiary, it cannot ignore the fact of incarceration and its effect on the prisoner's right to participate in civil proceedings. Some action must be taken to assure that the incarcerated prisoner has an opportunity to present his side of the case.

In other contexts this Court has noted that where the ordinary forms of procedure calculated to give notice and afford an opportunity to be heard are to the State's knowledge mere form, the State must go beyond the usual to insure an effective opportunity to be heard. In *Covey v. Town of Somers*, 351 U.S. 141, 146, 147 (1956), where the notice of a judicial foreclosure of a tax lien was given to a person known by a town to be incompetent, this Court held that:

> "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

Again in *Boddie v. Connecticut,* 401 U.S. 371, 379, this Court observed that ". . . the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

There is no countervailing State interest of sufficient importance to justify the trial of factual issues in a case without affording an unrepresented indigent prisoner an opportunity to be heard in his own defense. Transporting a prisoner to the place of trial and keeping him there while the trial is in progress would involve expense of the State. The cost to the State involved in affording due process, does not justify its denial. *Boddie v. Connecticut,* supra. Transportation of prisoners and their temporary quartering outside the State Penitentiary present dangers of escape. However, prisoners are often transported and quartered away from a prison. Removal for trial of pending criminal charges is a standard example.

If the State deemed the cost factor significant, it might arrange for subsequent recoupment of expenses. Many states make small payments to prisoners for labor in prison industries, costs could be charged against these wages. Perhaps reimbursement could be required after release and return to employment. Problems of transporting the pris-

oner might be obviated by appointing counsel for him. Perhaps then he would not need to be personally present. But whatever steps the State takes, it must at a minimum assure the indigent prisoner the opportunity in person or by counsel to hear the evidence against him, challenge it by cross-examination and by presentation of his own case.

The Nebraska Penal Complex permits process servers (County Sheriffs in this case) to enter the prison confines, so that service can be made upon a prisoner. The Penitentiary also permits prisoners to be transported to the place of trial if ordered or requested by a court. (See letter to counsel dated January 31, 1971 from Victor G. Walker, Director of Corrections of the Nebraska Penal Complex, Appendix C of this brief.)

The trial court was so advised by Huffman (A. 11, 47). Notwithstanding all this, the trial court ignored the timely the most cursory examination of the Transcript (A. 1 to 55 incl., 67 to 74 incl. and 76) and the Bill of Exceptions (A. 57 to 64 incl.) shows the total deprivation of even the most rudimentary protection of Huffman's rights. The entire trial record is only five pages long. In thirty-four questions and three exhibits, Huffman's marriage to Faye Boersen was declared a nullity and his right to establish his paternity of the child named Donald Lee Boersen was denied.

In other (Sixth Amendment, right to a speedy trial and to the right of confrontation of witnesses) but analogous contexts, this Court has held that a State has a duty to seek the return of prisoners from other jurisdictions (Federal prisons) to assure confrontation and a speedy trial. *Barber v. Page*, 370 U.S. 719 (1968); *Smith v. Hooey*, 393 U.S. 374, 383 (1968).

> "Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial."

Implicit in these cases is the imposition of a duty on a state to produce prisoners from its own prisons before its own courts in these circumstances. The right to be heard in a civil case is entitled to no lesser protection than the Sixth Amendment rights involved in *Smith v. Hooey*, and *Barber v. Page*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Nebraska Supreme Court dismissing Huffman's appeal should be reversed.

Respectfully submitted,

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February 3, 1972.

Appreciative acknowledgment is made of the valuable assistance of Steven M. Luttbeg, a graduate of the Creighton University College of Law, who could not sign because he was not yet a member of the Bar.

APPENDIX A

APPLICABLE NEBRASKA SUPREME COURT RULES

I

PRACTICE IN SUPREME COURT

1. Procedure on Appeal.

a. Perfecting of Appeal. Every appeal shall be deemed perfected on filing of notice of appeal in the office of the clerk of the district court, accompanied by a docket fee of $20, as required by section 25-1912, R. R. S. 1943.

b. Docketing of Cause. Upon forwarding such docket-fee and such notice of appeal to the clerk of this court, the clerk of the district court shall accompany the same with a certificate setting forth the names of all of the parties to the cause in the district court and their relation to the case as they appeared in that court. The clerk of the court shall thereupon docket the case designating the party or parties first having filed notice of appeal in the court below as appellant or appellants, and all other parties as appellees, *and any attempt to appeal thereafter made by any party thereto shall be filed therein and not separately docketed.*

* * * * *

f. Dismissal of Appeal. An appeal shall be dismissed on motion of the appellant or appellants, only if a copy of such motion shall first have been served upon the attorney or attorneys of record for all other parties at least ten days before said motion is acted upon by the court. If, at or before that time, any party thereto objects to said dismissal this court may disallow it if, in its judgment, any ground or grounds set forth in such objections justifies doing so. Any party having a right of cross-appeal at the time the motion to dismiss is filed may, within the 10-day period provided for in this rule, file a notice of his intention to cross-appeal. Upon the filing of such notice

the court shall deny the motion to dismiss and shall fix a brief day for such cross-appellant. The cause shall then proceed as if the appeal had originally been perfected by the appellee who has cross-appealed. An appeal, however, may be dismissed at any time upon stipulation of all parties of record in said cause.

3. Costs and Security for Costs.

a. Docketing Fee. Docket fees shall not be required in cases arising under the Workmen's Compensation or Unemployment Compensation laws. Advance payment of docket fees shall not be required in habeas corpus cases, post conviction cases, disciplinary proceedings, or in criminal cases where an affidavit of poverty has been filed under the provisions of section 29-2306, R. R. S., 1943. In all other cases, payment of docket fees in advance shall be made as required by section 33-103, R. R. S. 1943.

b. Security for Costs. An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R. R. S. 1943, unless additional time for compliance be granted for good cause shown.

4. Transcripts.

a. Contents. The transcript shall contain: (1) The pleadings upon which the case was tried; (2) the judgment, decree or final order sought to be reversed, vacated or modified; (3) the instructions given or refused by the trial court, if the appellant intends to assign error in the giving or refusal thereof; (4) a copy of the supersedeas bond, if any, given in the district court, or, if none has been given, a recital of the fact that a bond for costs was given and approved in the district court, or a deposit made as required by section 25-1914, R. R. S. 1943; and (5) such other parts of the record as the party appealing may desire to include therein.

b. Form. The transcript shall be typed or mechanically reproduced by a method which results in permanent copy, and shall be on only one side of the paper. If typed,

the typing shall not be smaller than pica and shall be prepared on white bond paper, 8½ x 14 inches, of not less than 16 pound substance. If mechanically reproduced, it shall be on white paper, 8½ x 14 inches, of substantial substance. Each page of the transcript shall be sharply and clearly legible. The transcript shall be securely bound at the top and each page thereof shall be consecutively numbered, such number to be placed at the bottom of the page. An index shall be supplied referring to the initial page of each item contained in the transcript. Such index shall constitute the first page of the transcript.

c. Supplemental Transcript. After the original transcript is filed in the clerk's office, any party may without leave of court file a supplemental transcript containing any matters omitted from the original transcript. After filing, no change in the original or supplemental transcript shall be made or papers added to or withdrawn therefrom without leave of court. All supplemental transcripts must be filed prior to the day the cause is submitted to the court, unless leave of court be first obtianed.

7. Bill of Exceptions.

a. Index. The bill of exceptions shall have an index starting on the first page thereof. The index shall show (1) each witness in the order called and the initial page of his or her direct, cross, and further examination, (2) all depositions and exhibits and the initial page where identified, offered, ruled on, and found; (3) stipulations, motions to dismiss or to instruct a verdict, together with the rulings thereon, and page where found, and (4) the certificate of the court reporter, which should always be placed in the first volume.

* * * * *

c. How Ordered. The party appealing may order a bill of exceptions by filing in the office of the clerk of the dis-

trict court a praecipe therefor within the time allowed for filing a notice of appeal. Unless otherwise specified therein, a praecipe requires that all of the evidence offered at the trial and all of the evidence offered at any hearing on any matter and the rulings thereon be included in the bill of exceptions. Appellant may in the alternative specify in the praecipe that less than all of such evidence be included in the bill of exceptions; however, the bill of exceptions shall be so prepared only if the written consent of all other parties be endorsed on or attached to such praecipe. The clerk of the district court shall forthwith deliver a copy of the praecipe, with attachments and endorsements thereon, to the court reporter and a copy to the Clerk of the Supreme Court.

d. Preparation and Delivery by Reporter.

1. Within two months after the filing of appellants's praecipe, the court reporter shall deliver to the clerk of the district court a bill of exceptions as requested in the praecipe and prepared in accordance with rules 7a and 7b. The bill of exceptions shall be certified by the court reporter as being correct and complete in accordance with the praecipe.

2. If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

3. Upon receipt of the bill of exceptions, the clerk of the district court shall forthwith file it and notify all parties or their attorneys of record and the Clerk of the Supreme Court of the date of such filing. When filed with the clerk of the district court, such bill of exceptions becomes the official bill of exceptions in the case.

e. Amendments. The parties in the case may amend the bill of exceptions by written agreement to be attached to

the bill of exceptions *at any time prior to the time the case is submitted to the Supreme Court.* Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time such case is submitted to the Supreme Court. The clerk of the district court shall send the bill of exceptions to the Supreme Court when directed to do so by the Clerk of the Supreme Court. After the bill of exceptions is filed with the clerk of the district court it may be withdrawn by any party or his attorney of record subject to the rules and orders of the district court. Hearings with respect to proposed amendments to a bill of exceptions shall be had before the judge who tried the cause. Such hearings may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing or be absent from the state, such proposed amendments shall be heard by the clerk of the district court for the county where the case was filed.

f. Extension of time for Preparation. Where a bill of exceptions has been ordered according to law by the timely filing of a praecipe, and the court reporter fails to prepare and file the bill of exceptions with the clerk of the district court within the time fixed by Rule 7d, the Supreme Court may, on the motion of any party accompanied by a proper showing, grant additional time for the preparation and filing of the bill of exceptions under such conditions as the court may require. Applications for such an extension of time shall be made within one month after the expiration of the time allowed by Rule 7d or within one month after the expiration of a previous extension of time, or within such additional time as the Supreme Court in its discretion upon proper showing may allow.

* * * * *

h. Criminal Cases. In all criminal cases where a defendant shall feel himself aggrieved by any opinion or decision of the district court, he may order a bill of exceptions, and the ordering, preparing, signing, filing, correcting, and

amending thereof shall be governed by the rules established in such matters in civil cases. In criminal cases where the sentence is capital punishment, the notice required by section 29-2306.02 shall constitute an order for the bill of exceptions, which order shall be filled by the court reporter within two months after receipt of such notice.

i. Case Stated. The parties may by agreement state the case to be presented to this court on appeal. The case stated shall briefly recite the facts out of which the questions of law arise and also any substantial conflict in the evidence as to any fact involved. It shall separately identify and quote the rulings of the court complained of with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated shall constitute the bill of exceptions. It must be allowed and certified by the judge who tried the case, filed with the clerk of the district court, made a part of the record of the district court as in other cases, and included therein where the transcript of the record is filed in this court.

9. Briefs, Printing and Taxation.

a. How Printed. All briefs shall be printed unless otherwise allowed by the court on good cause shown. Briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size. The printed matter shall be 4 inches wide and 7 inches long. The type used may be 12 point but not smaller than 10 point, with lines leaded 2 points except in quotations which may be leaded 1 point and exhibits may be prepared in smaller sizes when necessary. Italic type or underscoring may be used on citations.

b. Form of Cover. The cover and heading of each brief shall show the number and title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

c. Length of Briefs. The total content of all briefs filed on behalf of any party to a cause pending in this court on its original submission shall not exceed 100 pages, unless otherwise ordered by the court.

d. Cost of Printing. When the parties or their attorneys furnish their printed briefs in conformity to the rules of this court it shall be the duty of the clerk to tax a fee therefor against the unsuccessful party to be collected and paid to the successful party as other costs. Costs shall not be taxed for the printing of a reply brief except such part as is in answer to a cross-appeal, nor for printing briefs unless printed, served, and filed in conformity with the rules of this court. The amount taxed shall not be in excess of $2.60 per page but in no event to exceed the actual cost of printing. Proof of the actual cost of printing shall be submitted to the clerk with the filing of the brief. The total number of pages that may be taxed as costs shall in no event exceed 75.

e. Costs, When Taxable. Costs for briefs shall be taxed when served and filed within the time originally fixed as brief day, or, if an extension of brief day has been procured, within the time fixed by such extension.

10. Failure to Comply. The clerk shall refuse to file any brief not prepared in accordance with these rules and shall immediately notify counsel of the objections thereto.

11. Briefs, Filing and Service.

a. Time of Service.

(1) Civil Cases. In all civil cases, except advanced cases, appellant must file his brief within two months from the date the appeal is docketed in this court whenever there is no bill of exceptions ordered otherwise within one month from the expiration of the time allowed by our rules for preparing and filing the bill of exceptions with the clerk of the district court, or, if an extension of time is granted

by this court for that purpose, within one month from the expiration thereof, and shall file proof of service thereof on appellee showing that such service was made on or before brief day.

Within one month after the appellant has served and filed his brief, the appellee shall serve his brief on the appellant and file the same, together with proof of service thereof, with the clerk of this court.

Within ten days after the appellee has served and filed his brief, the appellant may serve and file a reply brief.

(2) Criminal Cases. In criminal cases the appellant must file his brief within two months from the date the appeal is docketed in this court whenever there is no bill of exceptions ordered otherwise within one month from the expiration of the time allowed by our rules for preparing and filing the bill of exceptions with the clerk of the district court or, if an extension of time is granted by this court for that purpose, within one month from the expiration thereof, and shall file proof of service thereof on the Attorney General, showing that such service was made on or before brief day. The state shall serve and file its brief within one month after the brief of the appellant has been served and filed. Within ten days after the state has served and filed its brief, the appellant may serve and file a reply brief.

(3) Advanced Cases. In advanced civil cases, brief day for both appellant and appellee shall be the same as in other cases unless a definite time be fixed by the court in its order of advancement.

(4) Original Actions. Brief day in original actions shall be fixed by order of court.

b. Method of Service. Service may be made either upon the party or an attorney of record. It may be made either by (1) personal service or (2) certified or registered mail. Proof of service may be shown by affidavit of the person making service or by receipt of the party served.

c. Filing. Fifteen copies of each brief so prepared by either party, together with proof of service of the same on opposite party, shall be filed in the clerk's office.

d. Amicus Curiae. Briefs of Amicus Curiae may be filed without leave of court in any case before it is placed upon the Call. After the case is on the Call leave of court must be obtained. In all cases such briefs must be served upon all attorneys of record and proof of service thereof submitted before the same may be filed.

e. On Rehearing. Where a rehearing has been granted or reargument of the case ordered, either party may file additional briefs. Fifteen copies of each brief so prepared and served, together with proof of service, shall be filed in the clerk's office not less than one week before the case is submitted. Unless the filing of such briefs shall have been ordered by the court, they shall not be taxable as costs.

12. Motions, Except Motions for Rehearing.

a. Form of Motion. All motions shall be in writing.

b. Notice of Hearing. Motions, other than motions for rehearing, shall, except under special circumstances, be noticed for hearing at 9:00 o'clock a.m. on the first day of a regular session. A motion and notice of hearing shall be served on the adverse party, or his attorney of record, at least three days before the hearing. The motion, notice and proof of service shall be filed with the clerk at least two days prior to the hearing.

c. Form of Notice. The notice herein provided for shall conform to the provisions of section 25-910, R.R.S. 1943, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing.

d. Service of Motion and Notice. The motion and notice shall be served in the same manner as provided by Rule 11b for the service of briefs.

e. Extension of Brief Day. An order extending brief day for 30 days may be requested by motion or stipulation. A further extension will not be granted except upon a showing of good cause.

f. Oral Argument Not Allowed. No oral argument shall be allowed in the following motions unless specifically ordered by the court:

(1) Motions to extend time for preparation of bill of exceptions.

(2) Motions to extend brief day.

(3) Motions to advance cases for hearing.

(4) Motions to continue cases on Proposed Call.

(5) Motions to consolidate cases for briefing and argument.

(6) Motions to recall mandate.

22. Mandates.

a. Issuance. No mandate will issue in any case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless ordered by the court or stipulated by the parties.

b. Stay Pending Appeal to United States Supreme Court. Parties desiring to prosecute proceedings to the Supreme Court of the United States, either by appeal or certiorari, may make application within twenty days from the date of the filing of the opinion for an order staying the issuance of the mandate. Such application must be accompanied by a sufficient written showing to indicate that a federal question is involved. If the application is granted, the court may require the giving of bond as a condition therefor.

c. *Motion to Recall Mandate.* A motion to recall mandate must be noticed and served as provided in Rule 12. Such motion must be supported by a showing that no action has been taken upon the mandate by the trial court. Objections may be filed on or before the date of submission of the motion.

APPENDIX B

Although not in the Record, by agreement of counsel the following additional facts with respect to this case have been stipulated:

(a) Huffman prepared a typewritten brief pro se which was delivered to the Gant Publishing Co. in Lincoln, Nebraska to be printed.

(b) Huffman and the said Gant Publishing Co. agreed in advance that the brief would cost the sum of $88.58 to be paid from Petitioner's funds in his account at the Nebraska Penal Complex. This sum was paid from the Inmates Fund to the Gant Publishing Co. on June 14, 1971.

(c) On June 16, 1971 Mr. Chester Paul, President of the Gant Publishing Co. personally attempted to deliver the printed copies of Huffman's brief to the Clerk of the Nebraska Supreme Court. The Clerk refused same, saying that the case had been dismissed, at which time the printed briefs were delivered to Huffman by Mr. Paul.

(d) At all times pertinent hereto, funds in Huffman's account at the Nebraska Penal Complex, after deducting the $20.00 docket fee and the $88.58 brief printing cost, did not exceed the sum of $5.00 and Huffman had no other funds or resources available to him, neither directly nor indirectly.

APPENDIX C

State of Nebraska
Nebraska Penal and Correctional Complex
Box 81248
Lincoln, Nebraska 68501

January 31, 1972

Mr. Leo Eisenstatt
Attorney at Law
Suite 707
City National Bank Building
Omaha, Nebraska 68102

Re: Harold Huffman
Our No. 27940

Dear Mr. Eisenstatt:

This is in response to your recent correspondence regarding the feasibility of having Harold Huffman personally available for court hearings.

Please be informed that a court order is necessary for the authorities at the Nebraska Penal and Correctional Complex to allow Huffman to appear in any municipal, county, district, or other state court within the boundaries of the State of Nebraska. This order should be directed to Charles L. Wolff, Jr., Warden, Nebraska Penal and Correctional Complex, P. O. Box 81248, Lincoln, Nebraska, 68501.

I sincerely hope that this information satisfies your inquiry. However, should you have any additional specific questions, please do not hesitate to contact me.

Sincerely,

/s/ Victor G. Walker
Director of Corrections

VGW/al

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1972, one copy of the Brief for the Petitioner was mailed, postage prepaid, to Vincent A. Dowding, Esq., P. O. Box 1192, Grand Island, Nebraska 68801, counsel for Respondent. I further certify that all parties required to be served have been served.

LEO EISENSTATT
707 City National Bank Bldg.
Omaha, Nebraska 68102
Counsel for Petitioner.